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No. 770

IN THE

Supreme Court of the United States

October Term, 1955

BEAUMONT BROADCASTING CORPORATION, *Petitioner,*

v.

THE ENTERPRISE COMPANY

and

FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Your petitioner, Beaumont Broadcasting Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case (The Enterprise Company v. Federal Communications Commission, Case No. 12,577) on December 29, 1955.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix A hereto, *infra*, pp. 1a-16a is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1955. Appendix A, *infra*, p. 17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 47 U.S.C. § 402(j).

QUESTIONS PRESENTED

Premise

Following a comparative hearing upon mutually-exclusive applications for a television construction permit, a final decision of the Federal Communications Commission was reviewed by the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act of 1934, as amended, and found lawful in all respects as of the time it was rendered.

Nevertheless, the court ordered the Commission to reopen the record, receive evidence of events which occurred after the time for filing a petition for rehearing before the Commission had expired, and, upon such enlarged record, to re-decide the original comparative issues.

Questions

Did the court exhaust its jurisdiction when it found that the Commission's final decision was proper upon the comparative hearing record? If not, is there any time in point of procedure when the court's jurisdiction does terminate?

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151-609; the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§ 1001-1011; and, the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. (1953) are set forth in Appendix B, hereto, *infra*, pp. 18a-20a.

STATEMENT

This petition seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit reversing a decision and order of the Federal Communications Commission which granted the application of Beaumont Broadcasting Corporation (Beaumont) to construct a new commercial television station on VHF Channel 6, Beaumont, Texas, and denied the mutually-exclusive application of The Enterprise Company (Enterprise) for the same facility. KTRM, Inc. was also an applicant for the facility but it withdrew from the proceedings under the circumstances detailed hereinafter.

By an Order dated July 11, 1952, the Commission designated for consolidated hearing on specified issues the three mutually-exclusive applications to determine on a comparative basis which, if any, of the applications should be granted. Public hearings were held before an examiner commencing on November 17, 1952, and concluding on March 11, 1953. On July 22, 1953, the examiner released an initial decision proposing to grant the application of KTRM and to deny those of Enterprise and Beaumont (R. 32-134).[1]

[1] Unless otherwise indicated, record citations are to the appropriate page of the Joint Appendix printed for the court below.

Exceptions to the initial decision were thereafter filed and each of the three applicants participated in oral argument before the Commission *en banc* on November 10, 1953.

On August 6, 1954, the Commission released its final decision dated August 4, 1954, granting the application of Beaumont and denying the applications of KTRM and Enterprise. The said decision was adopted by votes of four Commissioners for Beaumont and three for KTRM (R. 134-166). Timely petitions for rehearing were thereafter filed by KTRM on September 3, 1954, and by Enterprise on September 7, 1954 (Tr. 4677-4690). After the filing of both petitions for rehearing the Commission, on September 9, 1954, mailed a construction permit to Beaumont. The terms of the construction permit required Beaumont to commence construction of its television station not later than October 4, 1954, and to complete such construction not later than April 4, 1955 (R. 170). Upon receipt of the construction permit, Beaumont proceeded in accordance with the requirements thereof and Section 405 of the Communications Act of 1934,[2] and it continued with said construction until December 3, 1954. On that date the Commission issued an order in which it was stated that oral argument was found to be appropriate and desirable for the assistance of the Commission in the disposition of the petitions for rehearing (R. 167-168). Accordingly, oral argument before the Commission *en banc* was scheduled for December 21, 1954.

In the same order the Commission stated: "... for reasons of orderly procedure and the public interest,

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[2] 48 Stat. 1095, as amended, 47 U.S.C. § 405.

our decision of August 4, 1954 (FCC 54-1026) granting the application of Beaumont Broadcasting Corporation for the permit in question should be stayed pending the oral argument and disposition of the petitions for reconsideration"; and, the said decision was stayed "... in order to maintain the status quo, pending disposition by the Commission of the petitions for reconsideration and rehearing. . . . " (*Ibid*). It is to be noted that the Commission's decision and order were not vacated nor was the construction permit recalled.

On December 13, 1954, Beaumont filed with the Commission a motion to vacate the stay entered on December 3, 1954. In support of the motion Beaumont showed that, by necessarily complying with the terms of the construction permit, it had expended and had incurred contractual obligations for sums aggregating over $400,000. It was further shown that the construction necessary for the operation of the television station had then been 70% completed (R. 168-174).

Meanwhile, Beaumont and KTRM had undertaken to resolve the conflict between them. The negotiations resulted in a three-party agreement dated December 15, 1954, having as principals Beaumont, KTRM and W. P. Hobby (R. 203-210).[3] Briefly, this agreement provided that Mr. Hobby, then a stockholder in KTRM, would lend Beaumont $55,000 thereby enabling it to reimburse KTRM for sums expended in the prepara-

[3] W. P. Hobby then a 10% stockholder of KTRM, Inc. had an option to acquire additional stock which, if exercised, would have increased his holdings to a total of 35% of the voting stock of KTRM, Inc. The three-party agreement will be generally referred to hereinafter as the "agreement".

tion and prosecution of its application for a television station construction permit. Mr. Hobby also agreed to divest himself of all stock ownership in KTRM and to release KTRM from an option to acquire additional stock. KTRM agreed that upon receipt from Beaumont of the said sum, it would withdraw its petition for reconsideration and related pleadings filed with the Commission. For its part, Beaumont agreed that if the grant to it was affirmed, and thereafter upon notification by Mr. Hobby that he intended to exercise an option to acquire stock in a new corporation to be formed, Beaumont would form the said new corporation and make application to the Commission for its consent to a transfer of the construction permit to such new corporation. Should all of the contingencies come to pass and Mr. Hobby exercise his option, the ownership of the new corporation would be 67½% by Beaumont and 32½% by Mr. Hobby. The agreement expressly provided that it was made "... on the condition that it well and truly meets any and all requirements of the Commission, and/or any State or Federal authority having jurisdiction in the premises." (R. 207). Thus, it is clear that Beaumont is the permittee, will remain so until the Commission gives it approval to any proposed transfer pursuant to Section 310(b) of the Communications Act,[4] and upon such approval would continue to be the largest stockholder and in control of the station granted it. Promptly this agreement was made, Beaumont filed copies with the Commission as required by its Rule 1.342. 47 C.F.R. § 1.342 (1953).

Pursuant to this agreement, KTRM, on December 17, 1954, withdrew its petition for rehearing and ad-

[4] 48 Stat. 1086, as amended, 47 U.S.C. § 310(b).

vised the Commission that it would no longer participate in the proceeding (R. 175-177).

The Commission denied a request on behalf of Enterprise that the oral argument be postponed and the argument on the petition for rehearing, filed on September 7, 1954 by Enterprise, was heard by the Commission as scheduled on December 21, 1954 (R. 182-189).

Following oral argument, Enterprise filed with the Commission a "Supplement to Petition for Reconsideration" dated December 22, 1954 (R. 198) seeking to inject the agreement into a further hearing and incorporated therein other pleadings concerning the agreement (R. 189-197, 199-210).[5]

In a memorandum opinion and order released January 28, 1955 (R. 212-233) the Commission affirmed its decision of August 4, 1954, dissolved its stay order of December 3, 1954, and denied the petition for rehearing filed September 7, 1954, by Enterprise "... insofar as it [requested] a reconsideration and setting aside of the Commission's Decision of August 4, 1954 or a reopening of the proceeding for further hearing. ..." (R. 227). The Commission dismissed, as raising matters not relevant, the several pleadings of Enterprise referred to in the preceding paragraph (Ibid).

Enterprise appealed to the court below and contended, in the main, that the Commission was required to reopen the record, receive evidence pertaining to the agreement among Beaumont, KTRM, and Mr.

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[5] These pleadings of Enterprise were filed more than three months after the time allowed for filing a petition for rehearing. 48 Stat. 1095, as amended, 47 U.S.C. § 405.

Hobby, and thereafter make a new comparison because of such evidence.

A majority of the court below held that it could "... find no basis upon which to disagree with the decision as of the time it was rendered." (Appendix A, *infra,* p. 2a). Notwithstanding, it reversed and held that the Commission must reappraise the comparative qualifications of Beaumont and Enterprise because of the agreement. In so doing, the court ignored petitioner's contentions that the Communications Act, as amended, established the finality of a Commission decision when made, and gave your petitioner the right to act as it did. The court below held that unless the comparison was kept active to take into account the new agreement the rights of competing applicants are denied (Appendix A, *infra,* p. 8a), and that the Commission, in its discretion, should have reopened the record and completed comparative consideration in light of the new developments (Appendix A, *infra,* p. 9a).

Judge Danaher, dissenting, detailed the lengthy history of this comparative proceeding and concluded that the requirements of public interest, convenience and necessity had been met, and after more than two years of litigation, the public was entitled to television service, and by Beaumont. He pointed out that after the required comparative hearing, the Commission had made an award based on amply sustained findings that Beaumont is superior and that the court, having found no basis to disagree with the decision as of the time it was rendered, had exhausted its function and was under a duty to affirm. He also pointed out that notwithstanding the agreement the identity of Beaumont as the permittee remains unchanged and

hat lacking Commission approval, Beaumont simply nay not make any assignment of its construction permit. In his view, it was not within the province of he court to order another comparative hearing on an ssue which has not yet arisen and may never arise (Appendix A, *infra*, pp. 9a-16a).

REASONS FOR GRANTING THE WRIT

This case presents substantial questions never before decided by this court concerning the construction and applications of Sections 310(b) and 405 of the Communications Act of 1934, as amended.[6] These questions are of importance to the rights of parties before the Commission, to the administration of the Act, and to the development of broadcast facilities in the United States.

The decision of the majority below is important as well to proceedings before other federal agencies in that it now becomes doubtful that an administrative decision can ever be possessed of the finality which must attach at some point in the regulatory process.

Moreover, the majority below has refused to follow the decisions of this court and the law therein determined with respect to the separation of powers between the judiciary and administrative agencies.[7]

Should this decision be permitted to stand as a precedent, the disastrous effect upon the administrative process in the Commission and other federal regulatory agencies is obvious. A losing applicant need only file a petition for rehearing to hold open the record

[6] Appendix B. *infra*, pp.

[7] See discussion, *infra*, pp. 12-14 and cases therein cited.

for the receipt of evidence of changed circumstances as they may arise after the final decision. By successive petitions for rehearing final action could be postponed indefinitely. The result is a great burden upon both the administrative agency and upon the grantee who is required by law to proceed under its construction permit notwithstanding that a petition for rehearing has been filed.[8] The history of administrative proceedings reflects, and this case is no exception, a long lapse of time from the institution of a proceeding until final disposition thereof. Therefore, the threat of never ending administrative deliberation is not an idle one.

Thus, it is apparent that this case concerns the review jurisdiction of the court below, the powers and duties of the Commission after a comparison had been made in accordance with the law, and the rights of former competing applicants when a final decision and grant have been made pursuant to such comparison. The essence of the question then is to determine that point in time when a decision and order become final in the sense that the successful applicant may proceed under its authorization without fear that it will be thrust into another comparative hearing because of a fact occurring long after the grant even though such fact can have no effect upon the status of the grantee without prior approval of the Commission.

A majority of the court below was enabled to arrive at its erroneous result only by concluding, without citation of any authority in point or analysis of the Act, that because the Commission had not yet acted upon a timely petition for rehearing challenging the

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[8] 48 Stat. 1095, as amended, 47 U.S.C. § 405.

correctness of its comparison upon the record then made, the Commission's decision "... had not become final in the sense that it was no longer subject to change upon reconsideration." (Appendix A, *infra,* p. 6a); and, therefore, facts occurring after the time within which a petition for rehearing could have been filed under the statute required the Commission to "reappraise" the comparative qualifications between Beaumont and Enterprise.

In its decision, a majority of the court below relied upon two separate but fundamentally opposed legal concepts. At one point the court noted that the agreement in question "... was entered into about four months after [the Commission's decision] and therefore could not be included as a ground for reconsideration in the petition required by Section 405 to be filed within 30 days...." (Footnote omitted). (Appendix A, *infra,* p. 6a). Notwithstanding, the court proceeded to "... hold that unless such comparison is kept active to take into account the new agreement here involved the *rights of competing applicants are denied.*" (Emphasis added). (Appendix A, *infra,* p. 8a). Finally, the court said: "... the circumstances to which we have referred impel us to conclude that in the public interest the Commission, *in the exercise of a sound discretion,* should have reopened the record for reception of evidence of the new developments and to complete comparative consideration in light of those developments." (Emphasis added). (Appendix A, *infra,* p. 9a). Thus, the court below leaves the applicable law in a state of confusion as it bears upon important questions of the rights of parties before the Commission and the duties of this and other federal agencies. Accordingly, it provides no guidance either for pri-

vate parties or the Commission in the future. The writ should issue for this reason alone.

Whatever the rationale of the majority of the court below, its opinion transcends the jurisdiction of the judiciary by appropriating the functions of the Commission, to the detriment of the rights of your petitioner as well as all other persons whose applications have been or may be granted after comparative hearings. Judge Danaher, dissenting, pointed out that after finding the Commission's decision to be correct as of the time it was rendered, the majority of the court would order another comparative hearing on an issue which has not yet arisen and may never arise (Appendix A, *infra,* pp. 12a, 14a). In the view of Judge Danaher after the comparative hearing required by the statute had culminated in an award based on amply sustained findings that Beaumont is the superior applicant, it then became the duty of the court to affirm in accordance with the principles enunciated by this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (Appendix A, *infra,* pp. 15a-16a). It is submitted that the view of Judge Danaher is correct and should be so held by this Court.

To facilitate its regulatory functions, the Commission is vested with the adjunctory power to rehear its cases. Section 405 of the Act provides, in part, that "... it shall be lawful for the Commission, in its discretion, to grant [a rehearing] if sufficient reason therefor be made to appear." 66 Stat. 720, 47 U.S.C. § 405. Thus, whether or not the Commission shall rehear a case is a matter entrusted by Congress to the wisdom of the Commission. Section 10 of the Administrative Procedure Act precludes judicial review where "... agency action is by law committed to

agency discretion." 60 Stat. 243, 5 U.S.C. § 1009. The discretion to rehear cases having been vested in the Commission, its action in denying a rehearing was not subject to review by the court. The leading case in point is that of *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503. There it was made clear that rehearings were not matters of right but were pleas to discretion, and the discretion to be invoked is that of the agency making the order—not that of a court of review. See also *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515; and, *Carolina Scenic Coach Lines* v. *United States,* 326 U.S. 680, opinion, 59 F. Supp. 336 (W.D.N.C.). It follows that the court below exceeded its jurisdiction when it ordered the Commission to conduct a rehearing because of new developments.

In addition to appropriating the rehearing powers of the Commission, the court below has usurped the administration of the Communications Act in yet another important respect. It also ordered the Commission to consider "... the terms and character of the agreement as they bear upon the processes of the Commission and the public interest." (Appendix A, *infra,* p. 9a). Thus, it seems to be evident the lower court has assumed that the Commission will not abide its duty as required by the Act to protect the public interest should a transfer application ever be submitted for its approval. 48 Stat. 1086, as amended, 47 U.S.C. § 310(b). However, the court may not assume in advance that the Commission would fail in the performance of any duty imposed by law. *Yakus* v. *United States,* 321 U.S. 414. For it to do so anticipates and interferes with the regulatory functions of the Commission in excess of the court's jurisdiction. *Federal*

Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134.

It is apparent therefore that the majority below has not observed the strictures of the statutes or those of this Court concerning the proper place of the judiciary in performing its review functions. Instead, a majority of the court below has substituted *its* discretion for that of the Commission; has imposed *its* concept of what the public interest requires; and, enforces what *it* would have done in the circumstances. This is an important departure from statutory requirements and established law which should not be permitted to stand as precedent.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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March, 1956.

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12577

THE ENTERPRISE COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
BEAUMONT BROADCASTING CORPORATION, INTERVENOR

Appeal from the Federal Communications Commission

Decided December 29, 1955

Mr. Leonard H. Marks, with whom *Mr. Paul Dobin* was on the brief, for appellant.

Mr. J. Smith Henley, Assistant General Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker,* General Counsel, and *Warren D. Quenstedt,* Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. George S. Smith, with whom *Mr. Edwin S. Nail* was on the brief, for intervenor.

Before BAZELON, FAHY and DANAHER, Circuit Judges.

FAHY, *Circuit Judge:* The Enterprise Company, appellant, the Beaumont Broadcasting Corporation, intervenor, and KTRM, Inc., each filed with the Federal Communications Commission an application for a construction permit for a new commercial television station at Beaumont, Texas, to operate on Channel 6. As the applications were mutually exclusive, they were designated for

hearing in a consolidated proceeding. After the hearing the Commission, disagreeing with the decision of its trial examiner, who had favored the award of the permit to KTRM, granted the application of Beaumont, August 4, 1954,[1] and denied those of Enterprise and KTRM. The decision of the Commission accompanying its order contains an analysis of its reasons. We find no basis upon which to disagree with the decision as of the time it was rendered. However, Enterprise also specifies as error the failure of the Commission to reopen the record to consider evidence of events which occurred subsequent to the order of August 4.

In exposition of the significance of these events we refer first to the reason given by the Commission for granting the permit to Beaumont. The Commission states that the error of its examiner in deciding KTRM should have the permit stemmed principally from her failure to award a preference to Beaumont in regard to diversification and concentration of media for mass communication. The Commission said in part,

> "• • • Beaumont Broadcasting merits a clear superiority in this important area of comparison. There being no other significant difference among the applicants, there are no factors offsetting Beaumont Broadcasting's superiority in this regard • • •. Having concluded that this factor of diversification and concentration is the determinative feature in this proceeding, it is well to set forth some of the principles which have guided us in awarding a preference to Beaumont Broadcasting. • • •"

The Commission thereafter added,

> "• • • the Commission is unable to conclude that significant differences exist among the applicants in

[1] The decision of August 4, 1954, is sometimes referred to in the proceedings as having been rendered August 6, 1954. The decision and order are dated August 4th but were released August 6th.

any area of comparison other than that of diversification and concentration of control of media for mass communication. There are, thus, no significant countervailing circumstances or other factors of inferiority or superiority to balance the clear superiority to which Beaumont Broadcasting is entitled in the latter area. * * *"

Of special pertinence, the Commission found that KTRM had an AM broadcast station in Beaumont; that W. P. Hobby, under options held by him, could acquire up to 35 per cent of KTRM's stock and thus become its largest stockholder; that exercise of his option also would enable him to increase his representation on the board of directors to one less than a majority; and that Mr. Hobby was president, director and controlling stockholder of the Houston Post Company, which publishes the *Houston Post* and is the licensee of an AM, an FM, and a TV station, all of which have some overlap of signal into the area to be served by the proposed TV station in Beaumont. Upon reviewing the factual situation in further detail, the Commission concluded,

"* * * Aside from questions of overlap, the preference due Beaumont Broadcasting over KTRM in this matter of diversification and concentration of mass communication media is plainly evident. * * * Tipping the balance in favor of Beaumont Broadcasting, then, are Hobby's newspaper and FM interests in Houston. When consideration is given to the relatively small area into which the KTRM and Hobby interests are concentrated and to the fact that overlap occurs between the existing KPRC-TV and the proposed KTRM-TV, any remote doubts as to the superiority due Beaumont Broadcasting are emphatically resolved. * * *"

Both KTRM and Enterprise timely petitioned for reconsideration. By order of December 3, 1954, the Commission stayed the effectiveness of its decision of August 4 and set oral argument for December 21, 1954, on the petitions for reconsideration.

In the meantime, December 17, 1954, the Commission was advised of an agreement among Beaumont, KTRM and W. P. Hobby. Enterprise thereupon, December 20, 1954, moved for postponement of oral argument to enable it and the Commission to consider the effects of this agreement. In support of this motion, Enterprise urged that if upon scrutiny the agreement proved material to the comparative qualifications of the applicants, it should have time to move for a reopening of the record. The motion to postpone was denied and argument was held December 21st. By petitions dated December 22, 1954 and January 7, 1955, Enterprise asked the Commission to reopen the record for incorporation of the agreement, and upon its basis, to find such change in Beaumont's character as to require denial or dismissal of its application and grant of that of Enterprise.

On January 28, 1955, the Commission issued a memorandum opinion and an order affirming its August 4 decision. Enterprise's effort to have the record reopened was rejected, the Commission ruling that it was premature to consider the "executory" agreement. The Commission thereupon refused to modify its finding as to control of media for mass communication. The Commission also supplied an additional reason for its order by concluding that Beaumont should be preferred to Enterprise in the area of programming and possible effectuation thereof, but it still regarded the media of mass communication factor as vital.

The relevancy of the new developments to the highly important question of diversification and concentration of control of media for mass communication is clear. In the words of the Commission the agreement provided,

> "• • • that upon the happening of certain contingencies Beaumont Broadcasting will cause to be formed a new corporation to which the television permit granted to Beaumont would be transferred, and in which W. P. Hobby and Beaumont Broadcasting

would have interests. One of these contingencies is the reaffirmance by the Commission of the Decision of August 4, 1954."

KTRM was to receive $55,000 of expenses from Beaumont, the successful applicant, for withdrawal of its petition for reconsideration and related pleadings. W. P. Hobby, formerly, as already set forth, a stockholder of KTRM, was to make a loan to Beaumont to enable it to make the payment to KTRM, and was to receive an option to purchase a 32½ per cent stock interest in the new corporation. Beaumont was to hold 62½ per cent of the stock. The construction permit awarded Beaumont was to be assigned to the new corporation. Mr. Hobby was to give up his stock option in KTRM and assign his interest in KTRM to KTRM.

The Commission had found in its August 4 decision that the ownership interests of Mr. Hobby in KTRM tipped the balance against KTRM and in favor of Beaumont. Had his transition to a similar position in a new corporation which was to take over Beaumont's interests occurred before August 4, the balance well might have been tipped from Beaumont to appellant Enterprise or to KTRM. The new arrangements, therefore, argue persuasively in favor of their consideration by the Commission in deciding between Enterprise and Beaumont, KTRM having dropped out as a consequence of the agreement. The executory character of the agreement, in the sense that it was subject to Commission approval, would not have caused its consideration to be premature, for not only had a new factual situation come into being by reason of its execution but the agreement was to become operative as between the parties if the decision of August 4 in favor of Beaumont stood. Therefore, in determining whether that decision should stand it was timely to consider the agreement, if it should be considered at all in connection with the August 4 decision.

We are also told, however, that there must be an end to administrative proceedings so that the public interest will be served by the permittee going forward with the authorized construction. This view has some force in support of the failure of the Commission to reopen; but it is outweighed by other factors. The public interest also requires that the relative merits of competing applicants be weighed before the award goes to either. This is the special purpose of comparative proceedings. And in such proceedings the Commission has repeatedly stressed the importance of the facts regarding concentration or diversification of media for mass communication. Indeed, as the Commission said in its August 4 decision, this was the "determinative feature" of the present case. Furthermore, Mr. Hobby's ownership interests on August 4 were determinative of this particular feature. A shift in those interests among the parties to the comparative proceedings was a shift in the foundations of the August 4 decision. Furthermore, the shift was the result of financial arrangements of such a nature and so timed as to require the Commission to scrutinize them to determine whether or not they constituted an abuse of the Commission's processes. See *Clarksburg Publishing Co.* v. *Federal Communications Commission*, — U.S. App. D.C. —, 225 F. 2d 511. Although the contract was entered into about four months after August 4 and therefore could not be included as a ground for reconsideration in the petition required by section 405[2] to be filed within 30 days, this raises no statutory or other legal bar to incorporation of the facts in the record. This is so because the August 4 decision was still open. It had not become final in the sense that it was no longer subject to change upon reconsideration. The Commission itself recognized this as late as December 3, 1954, when it stayed its August 4 order "in order to maintain the status quo, pending disposition

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[2] 66 Stat. 720 (1952), 47 U.S.C. § 405 (1952), amending 48 Stat. 1095 (1934).

by the Commission of the petition for reconsideration and rehearing filed in the subject petition." Even if Enterprise could not as of right obtain reconsideration based on events which occurred after the record was originally closed or after its petition for reconsideration was filed, questions we lay aside, the Commission had power to grant such reconsideration. As we held in *Albertson* v. *Federal Communications Commission*, 87 U.S. App. D.C. 39, 41-42, 182 F. 2d 397, 399-401, jurisdiction over an order remains with the Commission until the time for appeal has expired, and that time is tolled by an application for rehearing. See, also, *Fleming* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 225 F. 2d 523.

It is urged that the proceedings had lost a comparative character, and therefore that the Commission could consider the agreement only under section 310(b),[3] separate and apart from any further comparison of Beaumont's qualifications with those of Enterprise. This is another way of pressing the argument of finality. But, we repeat, the events in question, though they occurred subsequent to the August order and the petition for reconsideration, struck at the very basis which had been assigned by the Commission for its decision, and were disclosed at a time when the decision was still open for reconsideration. In these circumstances nothing in the language of sections 310(b) or 405 deprived the Commission of power to receive the new evidence and to reconsider or redecide the case on a comparative basis. If this is not done the advantages of the comparative hearing are lost and its purposes frustrated. Section 310(b), important as it is in the total scheme of the Act, is no substitute for the comparative procedures available to applicants for the same permit. That section covers the situation where

[3] 66 Stat. 716 (1952), 47 U.S.C. § 310(b) (1952), amending 48 Stat. 1086 (1934).

a transfer, assignment or other disposition of a construction permit or station license or any right thereunder, or a transfer of control of any corporation holding any such permit or license, is desired. Application must be made to the Commission, which must find that the public interest, convenience and necessity will be served thereby. Obviously these provisions do not come into play so long as a comparison between competing applicants is or should be active; and we hold that unless such comparison is kept active to take into account the new agreement here involved the rights of competing applicants are denied. Enterprise, KTRM and Beaumont had applied for the same permit. The permit was granted to Beaumont primarily because of the Hobby interests in KTRM and because, on other grounds, Beaumont was found to be superior to Enterprise. While the proceedings were still before the Commission on petition for reconsideration the Hobby interests became the subject of an agreement with Beaumont for their transfer from KTRM to a new corporation in which Beaumont was to have 62½ per cent of the stock and Hobby 32½ per cent. Unless Enterprise is considered comparatively with Beaumont after Beaumont entered into this agreement the proceedings lose their comparative character. Though the agreement could not become effective without Commission approval, it had been made. The very making of it, and its terms, constituted important new facts bearing upon the relative merits of the two remaining applicants.[4] Furthermore, unless Enterprise can be heard comparatively with respect to those new facts its status as an applicant is lost. It could then object or protest, not as a competitor of Beaumont for the permit itself, but only as "any party in interest" after a final award had been made to Beaumont.

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[4] We assume that KTRM is no longer an applicant.

The Commission must have latitude in bringing finality to its choice between applicants but the circumstances to which we have referred impel us to conclude that in the public interest the Commission, in the exercise of a sound discretion, should have reopened the record for reception of evidence of the new developments and to complete comparative consideration in light of those developments. This does not mean that the grant of the permit to Beaumont must now be set aside by us, or must be set aside by the Commission when it reopens the record and considers the new evidence. Whether or not the permit to Beaumont should be revoked, or should be awarded to Enterprise, is for the initial decision of the Commission after taking account of this evidence in reappraising the comparative qualifications of Beaumont and Enterprise. The Commission should also consider the changed financial status of these applicants due to the agreement, as well as the terms and character of the agreement as they bear upon the processes of the Commission and the public interest. See *Clarksburg Publishing Co.* v. *Federal Communications Commission, supra.*

Reversed and remanded for further proceedings consistent with this opinion.

DANAHER, *Circuit Judge,* dissenting: Following protracted rule-making proceedings, the Commission, in the public interest, allocated television Channel 6 to Beaumont, Texas. Three mutually exclusive applications for that channel having been filed and consolidated, comparative hearings on designated issues were commenced November 17, 1952, three years ago. After extended hearings and many procedural steps, on August 6, 1954, the Commission released its final decision of August 4, 1954, finding Beaumont superior to its competitors. Petitions for rehearing were filed by KTRM and by Enterprise. The Commission issued the awarded construction permit

to Beaumont on September 9, 1954, calling for construction to commence not later than October 4, 1954, and to be completed not later than April 4, 1955. Construction went forward accordingly. Oral argument on the petitions for rehearing[1] was set for December 21, 1954, and Enterprise and Beaumont were then granted an *en banc* hearing, KTRM having withdrawn its petition on December 17 1954. The Commission on January 28, 1955, released its Memorandum and Order, reflecting in great detail its further consideration of the Beaumont and Enterprise claims, and affirmed its August 4, 1954, decision by which Beaumont had been established as comparatively superior and entitled to the award. Procedurally, the Commission had followed meticulously the essential steps outlined in *Johnston Broadcasting Co.* v. *Federal Commun. Comm'n.*,[2] and thereupon not once, but twice concluded that, comparatively, Beaumont had demonstrated its superiority over Enterprise. The requirements of public interest, convenience and necessity had been met, and after more than two years of litigation, the public was entitled to television service, and by Beaumont.

Without more, I take it, that would have ended the matter, and had review been sought, we would have been bound to affirm. Enterprise came here seeking a stay, urging then the substance of its present argument, but another division of this court, on March 8, 1955, declined to stay the Commission's August 4, 1954, order, as affirmed January 28, 1955. If Beaumont in its construction complied with the conditions of § 319, and of the Act, Beaumont was entitled to a *station* license, at this point without regard to the provisions of § 309(a), (b) and (c) of the Act.

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[1] Certain related pleadings were involved but are not itemized since they are immaterial for present purposes.

[2] 85 U.S. App. D.C. 40, 175 F. 2d 351 (D.C. Cir. 1949).

If *thereafter*, the station license had been issued, and if Beaumont had sought to assign its station license to some other entity, Beaumont would have been bound under § 310(b) to file an application with the Commission seeking its approval to be granted *only* if the Commission could find "that the public interest, convenience, and necessity will be served thereby."[3] Lacking Commission approval, the Beaumont Broadcasting Corporation simply may not assign its station license. Thus the Commission is charge by the Act and subject to its terms, to execute the Congressional will with respect to the regulation of radio broadcast licensing.

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[3] Congress in 1952, in its first major overhaul of the 1934 Act, deliberately and with complete understanding of the problem, indeed over the Commission's opposition, amended § 310(b). In applying the public interest, convenience and necessity test, the Commission must proceed as though the proposed assignee and no other person were applying for the license under § 308. See p. 12, H.R. REP. No. 1750 to accompany S. 658, 82d Cong., 2d Sess. (1952). And see Camden Radio v. Federal Communications Commission, 94 U.S. App. D.C. 312, 220 F. 2d 191 (D.C. Cir. 1954), *rehearing den.*, (1955).

Our former distinguished colleague Judge Justin Miller explained to the House Committee on Interstate and Foreign Commerce:

"This amendment would require the Commission to approve a transfer upon a finding that the transferee possesses the qualifications required under the Communications Act. The new language is designed to make certain that no construction permit or station license granted by the Commission may be transferred without the Commission's approval; to make definite the procedure to be employed by the Commission in passing upon transfer applications; and to clarify the standard to be applied by the Commission in passing upon the merits of the application.

"One of the purposes of the proposed new language is to prevent any such policy as the AVCO rule . . . ." *Hearings on S. 658 before the Committee on Interstate and Foreign Commerce of the House*, 82d Cong., 1st Sess. 354 (1951).

Turning now to the facts in the instant case, the majority correctly states: "We find no basis upon which to disagree with the decision as of the time it was rendered [August 4, 1954]." I agree that must be so. The construction permit was issued September 9, 1954, and Beaumont was bound by § 405 to go forward in accordance with its terms and has done so at vast expense. The filing of petitions for rehearing before the Commission under § 405 "does not even stay the order, much less vacate or nullify it."[4] With the order thus in full force and effect, but before the argument of the rehearing petitions, the Beaumont Broadcasting Corporation in December 1954 concluded a certain option agreement with KTRM and one Hobby.

Beaumont greed "that it will diligently continue to seek to have the Commission reaffirm the grant to it (Beaumont) of the construction permit heretofore awarded to it." Thereafter, but only upon notice from Hobby of his intention to exercise the option referred to by the majority, Beaumont "will forthwith make application to the Commission and will diligently seek the effective consent of that body to the assignment" to a corporation to be formed by Beaumont. *"Upon the condition that such consent or approval of the Commission is obtained, Beaumont will thereupon transfer and assign to the new corporation the said construction permit . . . ,"*[5] and will issue "to Hobby, upon payment therefor" 32½ per cent of the stock in the corporation to be formed. Meanwhile, against Beaumont's note, Hobby loaned Beaumont $55,000 to reimburse KTRM for "the sums expended by it in connection with the preparation and prosecution of its application for a television construction permit," and KTRM withdrew from the proceedings as of December

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[4] KFAB Broadcasting Co. v. Federal Communications Com'n, 85 U.S. App. D.C. 160, 162, 177 F. 2d 40, 42 (D.C. Cir. 1949).

[5] Emphasis supplied.

17, 1954. Hobby's option to subscribe and pay for 32½ per cent of the stock in the corporation to be formed by Beaumont was to run for 18 months, subject to extension. "This agreement is on the condition that it well and truly meets any and all requirements of the Commission, and/or any State or Federal authority having jurisdiction in the premises."

The corporation has *not* been formed. Beaumont Broadcasting Corporation has filed *no* application for assignment of its construction permit. If and when there is before the Commission some such application, both the statute, § 310(b) and Commission Rule 3.634[6] require Commission approval as a condition precedent before there may be a valid voluntary assignment of a television station construction permit.

Beaumont filed a copy of the option agreement pursuant to the Commission's "information" rule. Had it not done so before the December 21, 1954 argument, had it withheld the information until after the January 28, 1955 memorandum notwithstanding the execution of the agreement in December, a very different situation might well be said to have arisen. Here, however, on this record, there was no concealment. There was no fraud. There was no abuse of the Commission's processes.[7] Enterprise here was heard and its claims to preference were reviewed at length pursuant to its petition for rehearing. Of course, as the majority says: "The Commission had power to grant such reconsideration." There is

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[6] 47 C.F.R. § 3.634.

[7] Cf. Clarksburg Pub. Co. v. Federal Communications Com'n,— U.S. App. D.C. —, 225 F. 2d 511 (D.C. Cir. 1955), cited by the majority. There the *only* other applicant "dropped out" the day before the award to Ohio Valley. Moreover in the light of various factual deficiencies in the record, we found the Commission's "demurrer" procedure ill-adapted to fulfillment of the hearing requirements of § 309(c).

no issue on this point for the Commission exercised its discretion and it *did* grant reconsideration. Then, after oral argument and further consideration, for a second time the Commission found Beaumont superior to Enterprise. Now, more than three years since the comparative hearing was commenced, the majority would order another comparative hearing on an issue which has not yet arisen and may never arise.

One of the chief reasons why KTRM was found inferior in the first comparative hearing was the presence of the Hobby interests in the KTRM corporate structure. If, as a matter of public policy, that were a valid reason for the elimination of KTRM in the first place, it would seem that it will be a critical factor in the Commission's consideration of an application, *if and when filed*, by Beaumont Broadcasting Corporation to assign its permit to a corporation to be formed which will also include the Hobby interests. I would expect that the Commission at the time of any such application would give to this factor at least as much weight as it received in the first place. We are not justified in anticipating what action the Commission will take if and when it is asked to take action on an application for assignment. It is perfectly obvious from the terms of the option agreement that the parties recognize that it may never become operative for the very reason that the Commission may withhold its approval.

I understand the majority to say that the Commission is bound to set aside its grant to Beaumont and to order a new comparative hearing with respect to developments since the original August 4th award, in which comparative hearing Enterprise and Beaumont must again be considered as competitors on a comparative basis as though Hobby were already a stockholder in a corporation not yet formed. I cannot read the statute so, although I have tried to accommodate my views to those of my able colleagues whose judgment I respect.

It seems to me that there are two distinct safeguards contemplated in the statutory scheme. One is found in § 319(c) which authorizes the Commission before issuing a station license to take account of "cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the [construction] permit." The Commission must exercise its judgment as to whether or not such new cause or altered circumstances "make the operation of such station against the public interest." If the station license cannot "conform generally to the terms of said [construction] permit," or if the public interest will not be served as a result of such changed circumstances, the Commission may condition the grant of a station license upon a divestiture of any Hobby connection with the proposed new corporation, or otherwise limit the grant to Beaumont Broadcasting Corporation *as presently constituted.* Authority for such Commission action clearly exists under § 303(r).[8]

Again, the public has the additional protection that under § 310(b) the Commission must find, if and when an application for assignment is submitted, whether the "public interest, convenience, and necessity will be served thereby" not only with reference to *any* assignment, but with reference to the particular proposed assignee under § 308.

To the Commission has been entrusted the administration of the regulatory authority of the Congress in the radio broadcasting field. The machinery of the statutes was set in motion and here culminated, after the required comparative hearing, in an award based on amply sustained findings that Beaumont is superior. In the exercise of our judicial function, it is certainly not within our province to say that the award should have gone to someone else. Should our powers as a court later be invoked with reference to some *different* step as a *different* stage,

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[8] Cf. Regents v. Carroll, 338 U.S. 586, 600 (1950).

we then may consider whether or not the Commission has erred in its administration of the Act. As I read Mr. Justice Frankfurter's opinion in *Federal Comm'n* v. *Broadcasting Co.*, 309 U.S. 134, 144-45, our function under the Communications Act is "restricted to a purely judicial review." To paraphrase language quoted by him we ask: (1) did the Commission apply the legislative standards validly set up; (2) did it act within or go beyond the authority conferred upon it; (3) did its proceedings satisfy the pertinent demands of due process; (4) was there compliance with the legal requirements which fix the function and govern the action of the Commission? If, within those standards, the Commission has acted properly it is our duty to affirm. It is not our task to supervise the Commission's course for "courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. . . . Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies." *Id.* at 146. Moreover, if abuses develop in the conduct of an administrative agency, it is primarily the duty and the concern of the Executive to correct the situation, or the people will. That is the very basis upon which, under our constitutional form of government, there is a division of responsibility. It is the duty of the Executive to execute the legislative policy. It becomes *our* duty to ascertain whether or not there has been error, judicially reviewable, in the agency action complained of. As I read this record, the Commission has done exactly what it was called upon to do by the applicable statutes. What may happen in the future is not yet our concern. I would affirm.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,577 October Term, 19

THE ENTERPRISE COMPANY, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
BEAUMONT BROADCASTING CORPORATION, *Intervenor*.

Appeal from the Federal Communications Commission.

Before: BAZELON, FAHY and DANAHER, *Circuit Judges*.

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the Federal Communications Commission appealed from in this case be, and it is hereby, reversed, and that this case be, and it is hereby, remanded to the said Federal Communications Commission for further proceedings consistent with the opinion of this Court.

Dated: December 29, 1955

PER CIRCUIT JUDGE FAHY.

Separate dissenting opinion by Circuit Judge Danaher.

APPENDIX B

The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151-609 are:

Section 310. (b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 402. (b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

Section 405. After a decision, order, or requirement has been made by the Commission in any proceeding, and (sic) party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition preceden

to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under 402 (b) of this title, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed in any case, but any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

The relevant provision of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§ 1001-1011 is:

§ 1009. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

The relevant rule of the Federal Communications Commission, 47 C.F.R. (1953) is:

Section 1.342 (b) (3):

§ 1.342 *Filing of contracts, broadcasts licensees and permittees.* Each licensee or permittee of a standard, FM, television, or international broadcast station

shall file with the Commission within 30 days of execution thereof copies of the following contracts, instruments and documents, together with amendments, supplements and cancellations. The term "contract" as used in this section includes any contract, express or implied, oral or written. The substance of oral contracts shall be reported in writing:

....

(b) Contracts, instruments or documents relating to the present or future ownership or control of the licensee or permittee, or of the licensee's or permittee's stock, rights or interests therein, or relating to changes in such ownership or control. ...

....

(3) Any agreement, document or instrument affecting, directly or indirectly, the ownership or voting rights of the licensee's or permittee's stock (common or preferred, voting or non-voting stock), such as (i) agreements for transfer of stock, (ii) instruments for the issuance of new stock, (iii) or agreements for the acquisition of licensee's or permittee's stock by the issuing licensee or permittee corporation. Options to purchase stock, pledges, trusts agreements, (sic) and other executory agreements are required to be filed.

No. 776

FILED
APR 11 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

BEAUMONT BROADCASTING CORPORATION, *Petitioner*,

v.

THE ENTERPRISE COMPANY

and

FEDERAL COMMUNICATIONS COMMISSION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE ENTERPRISE COMPANY IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 770

BEAUMONT BROADCASTING CORPORATION, *Petitioner,*

v.

THE ENTERPRISE COMPANY

and

FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE ENTERPRISE COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed as Appendix A to the Petition.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit, reversing the decision of the Federal Communications Commission, was entered

on December 29, 1955 (Petition, Appendix A, p. 17a). The Petition for Writ of Certiorari was filed on March 17, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 47 U.S.C. 402(j).

QUESTION PRESENTED

The Federal Communications Commission rendered a decision granting a television authorization to one of three competing applicants. While that decision was stayed by the Commission pending its reconsideration, the winning applicant merged its interests with the principal stockholder of one of the losing applicants, causing a basic change in the character and qualifications of the successful applicant and vitally affecting the basis upon which the winning applicant had originally been preferred. Although requested to do so while the stay was still in effect, the Commission refused to consider the changed circumstances in the comparative proceeding. The Court of Appeals held that the failure of the Commission to consider this change in circumstances constituted an abuse of discretion by the Commission and deprived the competing applicant of the fair comparative hearing required by Section 309 of the Communications Act. The question presented is whether the decision of the Court of Appeals was properly within the scope of review provided by Section 10(e) of the Administrative Procedure Act.

STATUTES INVOLVED

In addition to those statutory provisions set out in the Petition (p. 3) and Appendix B thereto, the following statutory provisions are pertinent to these proceedings:

The pertinent provisions of Sections 309 and 402 of the Communications Act of 1934, as amended, 66 Stat. 715-20, 47 U.S.C. 309, 402, provide as follows:

"Sec. 309(a). If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. ... Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining. ...

. . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate ...

"Sec. 402(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

* * *

"(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act."

The pertinent portion of Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009 provides as follows:

> "(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall ... (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; ..."

STATEMENT

Three applicants applied for a new television station to be located in Beaumont, Texas: Petitioner, Beaumont Broadcasting Corporation (Beaumont),[1] Respondent, The Enterprise Company,[2] (Enterprise),

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[1] Beaumont is a Texas corporation, located in Beaumont, Texas. It operates a 5000 watt radio station (KFDM) in that City. Its President and largest stockholder is D. A. Canaan, President, Director and majority stockholder of the Wichtex Radio and Television Company, licensee of Radio Station KFDX and KFDX-TV in Wichita Falls, Texas; H. H. Fry, Secretary-Treasurer and minority stockholder of Beaumont also owns stock in Wichtex (R. 42-45; 160-162). At least for some purposes, the Commission considered Wichtex and Beaumont "as being under common control" (R. 159-160).

[2] Enterprise is a Texas corporation, located in Beaumont, Texas. It publishes the only daily newspapers in that City, the Beaumont Enterprise and Journal, and operates a 250 watt radio station (KRIC), also located in Beaumont. It has no other radio, television or broadcast interests (R. 36-38).

and KTRM Inc. (KTRM). In accordance with the provisions of Section 309 of the Communications Act, (66 Stat. 715, 47 U.S.C. 309(a)(b)) these three applications were designated for consolidated hearing to determine the financial and other qualifications of the applicants and to determine on a comparative basis which, if any, of the applications should be granted (R. 32-33)[3] On August 4, 1954, the Commission issued a decision in which it granted the application of Beaumont and denied the competing applications of Enterprise and KTRM (R. 134-166).

The decision of August 4, 1954, rested on one ground alone: the superiority of Beaumont in the "matter of diversification and concentration of mass communication media" (R. 161). The Commission found that in all other significant aspects the parties were equal. It found that:

> "* * * the Commission is unable to conclude that significant differences exist among the applicants in any area of comparison other than that of diversification and concentration of control of media for mass communication. There are, thus, no significant countervailing circumstances or other factors of inferiority or superiority to balance the clear superiority to which Beaumont Broadcasting is entitled in the latter area." (R. 162).

In preferring Beaumont over KTRM, the Commission found that KTRM had an AM (standard radio) broadcast station in Beaumont; that W. P. Hobby,

[3] The Petition (p. 3) incorrectly states that only the comparative issue was involved. The Court of Appeals in reversing the Commission adverted to the relevance of the absolute issues as well as the comparative issue. Petition, Appendix A, p. 9a.

under options held by him, could acquire up to 35 per cent of KTRM's stock and thus become its largest stockholder; that exercise of his option also would enable him to increase his representation on the board of directors to one less than a majority; and that Mr. Hobby was president, director and controlling stockholder of the Houston Post Company, which publishes the *Houston Post* and is the licensee of an AM, and FM, and a TV station, all of which have some overlap of signal into the area to be served by the proposed TV station in Beaumont. (R. 69; 138-139; 160-162) Upon reviewing the factual situation in further detail, the Commission concluded (R. 161):

> "* * * Aside from questions of overlap, the preference due Beaumont Broadcasting over KTRM in this matter of diversification and concentration of mass communication media is plainly evident. * * * Tipping the balance in favor of Beaumont Broadcasting, then, are Hobby's newspaper and FM interests in Houston. When consideration is given to the relatively small area into which the KTRM and Hobby interests are concentrated and to the fact that overlap occurs between the existing KPRC-TV and the proposed KTRM-TV, any remote doubts as to the superiority due Beaumont Broadcasting are emphatically resolved."

The Court below held that it could find no error with the decision of August 4, 1954, "as of the time it was rendered." (Petition, Appendix A, p. 2a).

After the decision of August 4, 1954, KTRM and Enterprise both filed timely petitions for reconsideration. On December 3, 1954, the Commission issued an order setting oral argument for December 21, 1954, on the petitions for reconsideration. At the same time

it stayed the effectiveness of the grant to Beaumont "in order to maintain the status quo pending disposition by the Commission of the Petitions for Reconsideration and Rehearing" (R. 167-168).

Beaumont, KTRM, and W. P. Hobby did not in fact maintain the status quo. On December 15, 1954, while the stay order was in effect and six days before the oral argument on the petition for reconsideration they entered into an agreement which provided for dismissal of the KTRM application and settlement of their competitive differences. On December 17, the Commission was informed of the existence of this agreement.[4] On December 20, 1954, Enterprise moved for a postponement of the oral argument until such time as it could secure a copy of the agreement and so that Enterprise and the Commission could consider its effects (R. 179-182). The motion to postpone was denied and the argument was held on December 21, 1954.[5] By petitions dated Dec. 22, 1954, and January 7, 1955, Enterprise asked the Commission to reopen the record for incorporation of the agreement, and, upon its basis, to find such change in

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[4] This filing was not as a part of this proceeding: No copy was sent to Enterprise and it does not appear in the record filed by the Commission in the Court below. On the same day, KTRM filed a letter with the Commission withdrawing from the proceeding in light of this agreement; this letter did not reveal the full terms of the agreement (R. 175-177).

[5] At the time of the oral argument Enterprise did not yet have knowledge of the terms of the agreement and the Commissioners themselves had no knowledge of the terms (R. 182-189). A copy of the agreement was requested of Beaumont on Dec. 22, 1954 (R. 197) but was not supplied to Enterprise until Jan. 4, 1955 (R. 211-212).

Beaumont's character as to require denial or dismissal of its application and a grant of that of Enterprise (R. 189-210). The KTRM-Beaumont-Hobby merger agreement stated that in order to resolve the competitive differences between KTRM and Beaumont, the following was agreed upon (R. 203-210):

1. Hobby would lend Beaumont $55,000.

2. Upon receipt from Hobby of the $55,000, Beaumont was required to pay over to KTRM the same $55,000 as reimbursement for the sums that it spent in the prosecution of its application.

3. Upon the receipt of this sum from Hobby, Beaumont at the same time would execute and deliver to Hobby a promissory note in the sum of $55,000 without interest. This note would be payable in the event that the grant to Beaumont was reaffirmed by the Commission. As soon as the grant was reaffirmed, the note was to be payable at such time as Hobby should execute the option described below. If Hobby did not execute the option, it was to be payable on demand by Hobby.

4. In return for the foregoing, and as soon as it received the $55,000, KTRM agreed to dismiss its application and its Petition for Reconsideration.

5. Beaumont agreed further that it would create a new corporation to which it would assign the construction permit and all assets of its television station, and that in this new corporation Hobby would have the option to purchase up to 32½% of the stock.

6. Hobby gave up and released his option to acquire any stock in KTRM and further assigned his 10% interest consisting of 65,387 shares in KTRM to KTRM, Inc., leaving him without any further interest in that corporation. By this

> action, in addition to his rights in a television application, Hobby also gave up a 10% interest in an AM station in Beaumont owned by KTRM, Inc. Hobby gave up these assets without compensation.

By exercise of his option, Hobby would become the largest individual stockholder in Beaumont's television station.

On January 28, 1955, the Commission issued a memorandum opinion and order affirming its August 4 decision. Enterprise's effort to have the record reopened was rejected, the Commission ruling that it was premature to consider the "executory" agreement (R. 213-216). The Commission failed to consider any of the facts relating to the merger agreement in the present comparative proceeding. The Commission refused to modify its finding as to control of media for mass communication. While supplying an additional reason[6] for preferring Beaumont over Enterprise, it still regarded the media for mass communication factor as vital to the comparison between them (R. 226-227).

Enterprise appealed to the court below and a majority (Judges Fahy and Bazelon) reversed and remanded the proceedings to the Commission to reopen the record to consider the new developments which occurred after August 4, 1954, and to complete the comparative consideration in light of these developments. The court held that the shift in Hobby's in-

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[6] On its own motion it found Beaumont superior in a limited area of programming and possible effectuation thereof. This aspect of the January 28, 1955 decision was not reviewed by the court below and is not here under review.

terests—the "determinative feature" of the August 4 decision—constituted a "shift in the foundations of the August 4 decision" and "struck at the very basis" of that decision (Petition, Appendix A, pp. 6a-7a). The Court held that the merger agreement took place at a time when "the August 4 decision was still open" and subject to change upon reconsideration. It pointed out that the Commission itself had stayed the decision, and that jurisdiction over the order and the proceedings rested in the Commission at the time reconsideration to consider the new developments was requested (Petition, Appendix A, pp. 6a-7a). Under these circumstances the Court held that the failure to take the new agreement into account constituted a denial of the rights of Enterprise as a competing applicant (Petition, Appendix A, p. 8a). The fact that the merger agreement could be later reviewed by the Commission in noncomparative proceedings was held to be "no substitute for the comparative procedures available to applicants for the same permit" (Petition, Appendix A, pp. 7a-8a). The Court also held that the shift in Hobby's interests "was the result of personal arrangements of such a nature and so timed as to require the Commission to scrutinize them to determine whether or not they constituted an abuse of the Commission's processes" (Petition, Appendix A, p. 6a). It held that the "exercise of sound discretion" required that the record be reopened to take account of (1) the new developments and to consider the new evidence in reappraising the comparative qualifications of Beaumont and Enterprise, (2) the financial status of the applicants due to the agreement, and (3) the terms and character of the agreement as they bear upon the processes of the Commission and the public interest (Petition, Appendix A, p. 9a).

Judge Danaher dissented. His dissent is based upon the view that since Hobby had only the right to acquire 32½% of the Beaumont permit but had not yet exercised his rights, the new developments arising out of the merger agreement did not have to be considered in the comparative proceeding but could be put off until the Commission reviewed the assignment of the construction permit to the new corporation in which Hobby would be a stockholder. Without exploration, Judge Danaher assumed that when the Hobby merger agreement was created, the order of August 4 was "in full force and effect." (Petition, Appendix A, p. 12a); he failed to advert to the fact that twelve days before the agreement was entered into, the Commission had stayed the effectiveness of the August 4 grant and had ordered the parties to maintain the *status quo*.

ARGUMENT

The Petition here is based upon the erroneous premise that an administrative agency has unlimited discretion in passing upon requests to reopen an administrative record to consider new developments which vitally affect a decision of that agency. Thus the Petition frames the question in terms of the jurisdiction[7]

[7] The Petition implies that the decision of the Court below is unusual because it ordered consideration of the new evidence despite the fact that the time for filing of a Petition for Rehearing under Section 405 of the Communications Act, 47 U.S.C. 405, had expired. This fact, however, is not material to the question presented in this Court. The Court below expressly held that the Commission had jurisdiction over the order granting the application of Beaumont at the time that the request for consideration of the new evidence was filed with the Commission, (Petition, Appendix A, p. 7a). The Petition does not question the correct-

of the Court of Appeals to review the Commission's decision denying Enterprise's request to reopen the record (Petition, p. 2). It asserts that Section 10 of the Administrative Procedure Act precludes review of that decision since it allegedly involved "agency action . . . committed to agency discretion" (Petition, pp. 12-13). The Petition implies that decisions of this Court support the proposition that the Commission's refusal to re-open the record was a matter solely in the Commission's discretion and unreviewable by the Court below (Petition, p. 13).

Concededly, whether an agency shall reopen a record is a matter entrusted primarily to the agency itself. The Court below stated "the Commission must have latitude in bringing finality to its choice between applicants" (Petition, Appendix A, p. 9a); the Court recognized that it could not interfere with the Commission's exercise of a "sound discretion", and that it could not substitute its own for the administrative judgment. But the Court below found that the action here was not "in the exercise of sound discretion" and that it deprived Enterprise of its statutory rights as a competing applicant (Petition, Appendix A, pp. 8a-9a). This decision is fully in accord with the responsibilities entrusted to the Court of Appeals under pertinent legislation and decisions of this Court.

The decisions of this Court cited by Petitioner do not support the proposition that agencies have unlimited discretion in passing upon petitions seeking re-

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ness of this determination and it is clear that the determination was in accordance with established authority. See *Albertson* v. *Federal Communications Commission*, 87 U.S. App. D.C. 39, 41-42, 182 F. 2d 397, 399-401 and cases cited therein.

opening of a record (Petition, p. 13). While these cases make clear that the discretion of the agency is broad, they expressly establish that courts have the power and duty to set aside such action where it constitutes an "abuse of discretion" or results in unfairness such as to invalidate the order. *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 515, 519; *Carolina Scenic Coach Lines* v. *United States,* 59 F. Supp. 336, 337-338 (D.W.D. N.C.), *aff'd,* 326 U.S. 680. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, also cited by Petitioner, makes expressly clear that if "in some specific respect there has been procedural departure from requirements of the law or abuse of the Commission's discretion," the reviewing court should reverse. 327 U.S. at 536.

Moreover, Petitioner has significantly failed to call to the Court's attention Section 402(g) of the Communications Act, (66 Stat. 720; 47 U.S.C. 402(g)) and Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009, *supra,* pp. 3-4) which define the scope of judicial review on appeals from the Federal Communications Commission. Section 10(e) provides that the reviewing court shall "hold unlawful and set aside agency action found to be . . . an abuse of discretion . . . (or) without observance of procedure required by law". The Court of Appeals thus had the duty to reverse the Commission where it found the Commission's action deprived Enterprise of its right to the comparative hearing granted to it by Section 309 of the Communications Act, 66 Stat. 715, 47 U.S.C. 309 (a) (b), *supra* p. 3.

The essence of this case lies in the statutory requirement that Enterprise be afforded a fair comparative hearing on its application which was in com-

petition with Beaumont's. This Court had held that this statutory right to a comparative hearing shall not be niggardly interpreted to render it "an empty thing;" not only the form but the substance of the comparative hearing must be afforded the applicants. *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U.S. 237. In this case, if the shift of Hobby from KTRM to Beaumont is not considered in these comparative proceedings, Enterprise's right to a comparative hearing is reduced to an empty thing. The ownership by Hobby of a newspaper and radio and television stations—held by the Commission to be adverse factors against KTRM—had to be considered as adverse factors against Beaumont who had merged with Hobby.[8] The choice was no longer between Enterprise and Beaumont, as it was originally constituted, but between Enterprise and

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[8] The fact that Hobby had not yet exercised his option rights to become a stockholder is not material. The Commission regularly considers unexercised options in determining the identity, character, and qualifications of an applicant. See, *e.g.*, *KMYR Broadcasting Co.*, 9 Pike & Fischer R.R. 467, 480. As a matter of fact, in the August 4, 1954 decision in this case, the Commission gave full force and effect to the option of Hobby to acquire up to 35% of the stock in KTRM and, based on that option, treated him as KTRM's largest stockholder whose "position with KTRM therefore, roughly approximates that of D. A. Canaan with Beaumont Broadcasting" (R. 160). The Court below found that Hobby's interest acquired as a result of the merger agreement would have been considered by the Commission had it been acquired prior to August 4, 1954 and "well might have" tipped the balance from Beaumont to Enterprise. (Petition, Appendix A, p. 5a). The Petition, while emphasizing that Hobby had not yet exercised his option, does not challenge the court's determination that the facts with respect to the option would have been considered if they had occurred prior to August 4, 1954.

a new applicant whose ownership of mass media included not only the original radio stations and television stations controlled by Beaumont, but now also the newspaper, radio and television stations controlled by Hobby. The effect of the Hobby merger was to create a situation where Beaumont will now have interests in two existing television stations while Enterprise will still have no interest in any television station at all. The new developments were, therefore, vital and had to be considered in this proceeding. As the Court below said (Petition, Appendix A, pp. 7a-8a):

> "If this is not done, the advantages of the comparative hearing are lost and its purposes frustrated. Section 310(b), important as it is in the total scheme of the Act, is no substitute for the comparative procedures available to applicants for the same permit. That section covers the situation where a tranfer, assignment or other disposition of a construction permit or station license or any right thereunder, or a transfer of control of any corporation holding any such permit or license, is desired. Application must be made to the Commission, which must find that the public interest, convenience and necessity will be served thereby. Obviously these provisions do not come into play so long as a comparison between competing applicants is or should be active; and we hold that unless such comparison is kept active to take into account the new agreement here involved the rights of competing applicants are denied."

The refusal of the Commission to consider the shift of Hobby from KTRM to Beaumont not only constituted a denial of a statutory right, but was also a highly arbitrary and capricious abuse of discretion.

Braniff Airways, Inc. v. *Civil Aeronautics Board,* 79 U.S. App. D.C. 341, 147 F.2d 152. In that case, the Court of Appeals, speaking through Judge Edgerton, held that the Civil Aeronautics Board has abused its discretion where it failed to reopen the record in a comparative hearing to take into account new facts concerning the unavailability of the president and majority stockholder of a company which had been awarded an airways authority based upon the availability of that stockholder. There, as here, the change in facts was vital to the original comparative decision. In the instant case, the abuse of the Commission's discretion is all the more patent. By the voluntary maneuvering of the other parties and the payoff of one of the original applicants, not only were the grounds of the August 4 decision dissipated, but serious questions were raised as to the financial status of Beaumont and the possible abuse of the Commission's processes while a stay order was in effect. *Cf. Clarksburg Publishing Co.* v. *Federal Communications Commission,* — U.S. App. D.C. —, 225 F.2d 511. These were matters which Enterprise had the statutory right to have litigated in the comparative proceeding, since they not only might constitute the basis of out-right denial of Beaumont's application, but certainly were matters going to the comparative qualifications of the applicants.

Accordingly, the Court below acted fully within its proper authority and in accordance with the requirements imposed upon it by Section 10(e) of the Administrative Procedure Act. Its action was fully consistent with the decisions of this Court setting forth the proper relationship of the Courts and administrative agencies upon judicial review. No special ques-

tions are here presented in the field of communications law or the administration of the Communications Act. The decision below is limited to the narrow area where jurisdiction remains in the agency to reconsider and it abuses its discretion by failing to consider new and vital evidence.

It is significant that the Commission and the Solicitor General have not sought review of the decision of the Court below and have filed no statement in this Court with respect to this Petition. We may be sure that if the decision below raised questions of importance which might affect either the Federal Communications Commission or other agencies, the import of the decision would have been called to this Court's attention by the Solicitor General. On the contrary, this case involves only the private interest of Petitioner, which seeks to secure the benefits of its machinations, by clothing around itself high sounding principles of law—principles which, however, when scrutinized are found to be novel and contrary to the decisions of this Court and the pertinent statutes of Congress.

CONCLUSION

The decision below is correct and no question warranting further review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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